No. 11040.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BENEFIT SOCIETY,

Appellant,

vs.

MAYNARD GARRISON, Insurance Commissioner of the State of California, and H. F. RISBROUGH and MAE BARR LONG, Deputy Insurance Commissioners of the State of California,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

In this reply to Appellees' Brief, we shall attempt to follow the sections thereof chronologically as they appear in the brief.

Nature of the Case.

Appellees set forth what they consider the nature of this case. They state that it is an appeal from a decision, declaring in effect, that Appellant may not transact business in California without complying with the California regulatory enactments. We contend that this is not the issue in the case, and that the matter of appellant doing business in the state of California is not involved herein. The case was dismissed on the allegations as they appear on the

face of the complaint and the complaint states [Tr. Rec., p. 3]:

> "That the plaintiff, the First National Benefit Society, has never maintained an office or agency in the State of California and has *never done business in the State of California.*"

This case involves only the Appellees' interference with interstate commerce, and its prohibition of acts which have never been held to constitute "doing business" within a state.

Appellees further continue on page 2 of their brief that if appellant had been successful in the court below or in this Court, it would mean that Appellant or any insurance corporation, by the expedient of operating from another state, may nullify California insurance laws in existence for many years. No such issue is involved and no such result would obtain; however if appellant were successful in the Court below or if it is successful in this Court, it would mean that the practices of the Insurance Department of the State of California and many of the other states, engaged in for many years whereby they have prohibited interstate transactions with its citizens by companies organized and operating in other states would, indeed be nullified. The fact that this practice has long been indulged in, cannot sustain it any more than the fact that the combinations denounced in *United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, had been practiced for many years could not sustain such practices. Appellant has not contended and does not contend that the *SEUA* case, *supra*, has the effect of voiding all state regulatory legislation.

We admit that any corporation or individual which does business in a state must comply with the valid regulatory

legislation of that state, but we do contend that since we must now regard insurance as commerce and when transacted across state lines, interstate commerce, that the multitude of decisions by the United States Supreme Court protecting such commerce from the prohibitions of the state are now illegal.

Statement of the Case.

Appellee has stated (Appellees' Brief, p. 3) that the complaint alleges that plaintiff, the appellant herein, "has never maintained an office or agency in the State of California, but has members in the State of California, etc." Appellees have placed a comma after the word "California" and have continued with the statement concerning appellant's members, while the complaint [Tr. Rec., p. 3] from which these statements were taken does not place a comma after the word "California", but continues with the words

> "* * * and has never done business in the State of California."

Appellees follow with what they consider the gist of the complaint, stating that these matters are set up in a limited manner. As a matter of fact, they are set up in detail and at length, but of course are limited for the reason that every act of the character complained of cannot be set out as space would not permit.

Since appellant has set forth in its statement of the case the gist of the complaint, the sufficiency of which is in question herein, and since we believe that the complaint itself is not any longer than appellees' recitation of its contents, further reference to appellants statement of the case would avail nothing.

Statutes Involved.

Appellant agrees with appellee that the statutes set out under the above heading in their brief, pages 8-12 thereof, are involved in this case, but disagree with the appellees' interpretation thereof and their conclusions therefrom.

Appellee has set out in the pages above referred to certain of the laws of California involved herein, and we believe, have correctly shown that "Chapter Nine" companies defined in Section 10810 of the California Insurance Code provides for insurers operating under substantially the same laws as those under which appellant is authorized to transact an insurance business by the State of Arizona. Appellees have further shown that under Section 10810 only such companies existing in California on January 1, 1940 can now do business in that state. They contend that since there can be no new California companies admitted in that state that there is no discrimination against appellant, while we contend that a law which protects a limited number of companies in the transaction of a certain type of business and excludes all other companies from entering that field in the state, is creating a monopoly on behalf of those already in the field and is therefore discriminatory. The point involved herein in relation to interstate commerce is still more serious.

Appellant has not applied for permission to do business in the State of California and indeed under the law such application would be an idle act, but it has merely endeavored to complete a number of interstate transactions with the citizens of the State of California and to deliver to those citizens of California an article of commerce, the sale of which is not prohibited in that state, but is allowed by certain companies now operating therein.

The only article of commerce which, under the decision of the United States Supreme Court and the intent of the Constitution, may be prohibited in interstate commerce is intoxicating liquor, and that is by reason of the reservation in the Twenty-First Amendment whereby the Eighteenth Amendment was appealed with the special reservation that liquor could not be imported into a state contrary to the laws of that state. In other words, the right of any state to prohibit interstate transactions in liquor (the most regulated article of interstate commerce) is predicated upon the reservation in the Twenty-first Amendment to the Constitution, preserving to the states the right to prohibit commerce therein or to in any other way regulate the same. In *Blatz Brewery v. Collins,* 160 Pac. (2d) 45, *Fintch & Co. v. McKittrick,* 305 U. S. 395, and *State Board of Equalization v. Youngs Market,* 299 U. S. 59-63, the Courts have said that to place any other construction upon the Twenty-first Amendment would be to rewrite it. As we have insisted oft before in the conduct of this case that if appellees will cite one case by a Federal Appellate Court upholding the right of a state to prohibit in interstate commerce that which it allows to be sold by others within its boarders outside the authority of this amendment, we will be willing to subside in this regard.

Even where the article is prohibited by a state, which was true in regard to alcoholic liquors prior to the Eighteenth Amendment, it still could not be prohibited in interstate commerce and such prohibition by the state now is only valid because of the special provision in the Twenty-first Amendment providing for it.

Appellees' statement on page 11 of their brief that California does not now allow any life insurance business to be sold in California except upon a legal reserve basis by

any company other than those existing and doing business prior to January 1, 1940 followed with the statement that it does not discriminate against any company, amounts to saying two different things in the same breath.

Argument.

I.

The first topic under the argument set forth by appellees is that the holding of the United States Supreme Court in *United States v. Southeastern Underwriters Assn.*, 64 S. Ct. 1162, 88 L. Ed. 1082, does not void regulatory laws. Appellant has never contended and does not now contend that this case does void state regulatory laws. Appellees, in their statement that this is contention of appellant, have misunderstood its contention.

Appellant does contend however that there has been some change as to the right of the state of California or any state to interfere with or prohibit transactions in that subject known as insurance, which is now held to be interstate commerce, and must be subject to the decisions limiting the rights of the states in connection therewith.

Beginning on page 13 of Appellees' brief is a digest of the holding of *Paul v. Virginia*, 8 Wall 168, and a citation of the leading cases which followed that decision upholding state regulation of interstate insurance transactions on the sole ground that insurance is not commerce and hence could not be interstate commerce. We have carefully examined all the cases upholding the right of the state to interfere with or to regulate interstate insurance transactions, and it appears that every one of them is based upon the fact that insurance is not commerce and when transacted across state lines is not interstate

commerce. Appellees then follow by stating that *a* finding of *Paul v. Virginia,* 8 Wal. 168, was reversed. As a matter of fact, the *only* finding of *Paul v. Virginia, supra,* was reversed, to-wit: Insurance is commerce and when transacted across state lines is interstate commerce.

Appellees' argument could mean only one thing, and that is that they contend that insurance is not commerce when a state law is being interpreted and that it is commerce when a Federal law is being tested. We have contended throughout this discussion that the only distinction made by the Supreme Court in the *Southeastern Underwriters Assn.,* case, *supra,* is in the following language quoted by counsel on page 15 of their brief, to-wit:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are too intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the States."

We call this Court's attention to the fact that the Supreme Court in discussing the question as to whether or not state regulation would be abolished indicated that statement would be subject to *qualification* and then set out the qualifications in the above language.

After the Court's statement that some of the activities of the same business would be subject to Federal regulation there appears a footnote number 29, and the footnote cites as its first cases *Crutcher v. Kentucky,* 141 U. S. 47 and *Atlantic Refining Co. v. Virginia,* 302 U. S. 22, both

of which cases hold that a state may not require a party engaged in interstate commerce to obtain a license to transact such business.

On page 16, appellee quotes the opinion of Justice Black in the *SEUA* case, *supra*, as follows:

> "To uphold insurance laws of other states, including tax laws, Paul v. Virginia's generalization and reasoning have been consistently adhered to."

Counsel then continues with the statement that in such language the Court is stating that he sees no reason why such statutes could not be upheld.

It appears to us that when a Court has reversed a decision of long standing, and in that reversal states that certain laws have been based entirely upon the generalization in that case, that he is stating that those laws are no longer effective. If Justice Black has called attention to the fact that state laws in regard to interstate insurance transactions have been upheld by following the generalization of the case which is being reversed, in that very opinion that he is calling attention to the fact that those laws have had their foundations removed and that they must now fall insofar as they attempt to interfere with or regulate interstate transactions therein.

On page 16 of appellees' brief, counsel quotes the Court as follows:

> "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated."

If this statement means, as counsel attempts to interpret it, that state laws will not be affected at all, why has the Court not said so instead of using the word "exaggerated."

The word "exaggerated" means overstatement. We agree that this would be an overstatement. The state laws are not invalidated but insofar as they prohibit, burden or discriminate against interstate transactions, they are invalid. This, we believe, is the reason the Court said the statement was "exaggerated" rather than coming out with the statement that these laws would not be affected. It would have been so simple for the Supreme Court to have said that the state laws regulating this type of interstate commerce would not be affected if this were its opinion.

At the bottom of page 17, counsel makes this statement:

> "These expressed views clearly demonstrate that the majority justices were fully aware that their discussion in that case would encourage cases just like this case now before the Court."

We agree that the Supreme Court knew that a case exactly like this one would be before it, under its *SEUA* decision. That being the case, would it not have been reasonable to expect that if the Supreme Court felt that there would be no change by reason of this decision that it would have said so, because the argument was before it and the contention had been made. Instead, the Court said, "* * * that broad statement without qualification * * *" is contrary to many of our decisions and also said, as counsel has stated, that such statement was "exaggerated".

Could it be plainer that the Supreme Court contemplated that there would now be some qualification of the states regulatory rights and that it has pointed out that those regulations would be in effect except insofar as they attempt to interfere with, prohibit, or license interstate commerce.

On pages 18 and 19 of their brief, Appellees cite the *Polish National Alliance of North America v. National Labor Relations Board,* 64 S. Ct. 196, 88 L. Ed. 1117, decided simultaneously with the *Southeastern Underwriters* case, *supra,* and by quoting certain of the phraseology have merely continued their effort to establish that one certain phase or activity of a business is interstate commerce when a Federal Law is in question and intrastate commerce when a state law is in question.

Beginning on page 19 of their brief, appellees state that comment of eminent authority is pertinent and quotes 1944 Columbia Law Review, pp. 775-777 to the effect that the dissenting opinions were based upon the belief that state legislation would be outlawed and would bring confusion into the field of insurance. The statement follows that the majority regarded these apprehensions as greatly exaggerated. Will counsel for the appellees explain why this eminent authority, together with the Court itself has used the word "exaggerated" or "qualified" in connection with this subject instead of using the word "unfounded" or some other word which would thoroughly dispose of the matter? It appears to use that when eminent authorities skilled in the use of the English language state that certain contentions are exaggerated or that they must be qualified, do not mean that these contentions are entirely without foundation. Certainly, these authorities, by their plain words have told us that in some respects these state regulations would be curtailed. If this is true, it must be based upon some distinction and the only distinction possible is the difference between the regulation of companies doing business within a state as compared with a series of transactions across state lines, not amounting to "doing business" within the state.

We agree with counsel that eminent authority on Constitutional law is very often the safest guide to Constitutional construction.

Hugh Evander Willis, whose recognized work on Constitutional Law of the United States, is cited in our Opening Brief on page 18, believes that at least one effect of the decision must be now apparent, and that is that the Equality Clause of the United States Constitution must now be applied to all interstate transactions in insurance as a result of making insurance interstate commerce, and that the state cannot require that an insurer obtain its consent to enter into such transactions. We have no quarrel with appellees' contention that the insurance business is of such a nature that it permits of governmental regulation. (The Insurance Law Journal, Issue No. 258, p. 393, July 1944).

The effect of the *SEUA* decision is being constantly commented upon in the well-known insurance trade journals. In the National Underwriter under date of August 16, 1945, beginning on page 5 thereof is an article reviewing the activities and statements of Frank H. Elmore, former assistant to the United States Attorney General, who had much to do with the progress of the *Southeastern Underwriters* case. This article is a review of the publication in the Journal of American Insurance, the organ of the American Mutual Alliance. On page 6 of the National Underwriter of the above date is the following statement by Mr. Elmore:

> "Thus at long last the legislative, executive and judicial branches of the federal government are in agreement that insurance is commerce and the unrealistic fiction established in Paul v. Virginia is but a historical memory. * * * The investigation,

the indictment and the decision itself all have been criticised and denounced. Some exprobation may have been deserved. But I am confident that benefits will flow to all whose lives, property, or affairs are touched by the great national, or international, institution of insurance from the official recognition that this industry, served by and serving millions, is now entitled to take its true place. By the side of hundreds of other trades and industries, it will go forward in the American way, sharing with them the discipline and the protection of the commerce clause of the United States constitution."

II.

"California Statutes Regulating and Controlling Insurance Companies and Their Agents Operating in California Are a Proper Exercise of the State's Police Power."

We have no fault to find with this statement. *Of course* the State of California can regulate companies doing business within its borders.

There is one contention, however, made by appellees under this heading that should be cleared up.

There is no law in the State of California requiring an insurance agent or insurance solicitor to obtain a license to indulge in that business separated from an agency to represent a particular company or employer. No person could obtain a license in the State of California to perform any transaction for the appellant herein or for any nonadmitted company. Section 1640-1750 of the California Insurance Code. This law is not therefore just a means of insuring that such agents be of good moral character, but is also a means of seeing to it that no non-

admitted company transacts any business with a citizen of the State of California.

One of the Sections under which the said F. O. Robertson, mentioned in the complaint herein, was arrested and prosecuted, is Section 703 of the California Insurance Code. Subdivision "a" thereof makes it a misdemeanor to act as an agent for a nonadmitted insurer in the transaction of insurance business in that state. As a matter of fact, the acts as set forth in the complaint herein do not constitute transacting business in the State of California. The full significance of this section can be ascertained by reading Sections "b" and "c" thereof. Section "b" prohibits the advertising of a nonadmitted insurer so that even a card in the mail, a radio broadcast or an advertisement in a newspaper would be a violation of this section. Section "c" makes it a misdemeanor to in any other way aid a nonadmitted insurer to transact insurance business in that state, which would include the delivery of a check to a beneficiary or an examination by a physician. The language would also include the act of a citizen in insuring his life or his property with a nonadmitted company.

Sections 703(a) and Section 1642 of the California Insurance Code prohibits a member of a foreign insurer or any person in the State of California from assisting in any such interstate transaction except in the case of a surplus line broker, which broker, under Chapter Six, Sections 1760 to 1779 of the said insurance code, must obtain a license, must pay a discriminatory three per cent tax, must not write the business in a non-admitted insurer, unless there is no admitted insurer in which the risk can be written, or he must not write it for a less premium than it would be written by any company admitted to do business in the State of California.

Further, in spite of the fact that any citizen of California, under the Federal Constitution is entitled to insure his life with any company of his choosing, if he has done this under the authority of the only law in California which will permit it, to-wit the surplus line brokers' law, he would then be subject to the restrictions set out in Section 1779 of the California Insurance Code which reads as follows:

> "1779. Every insured for whom insurance has been effected with nonadmitted insurers shall, upon request in writing by the commissioner, produce for the commissioner's examination all policies, contracts, and other documents evidencing such insurance, and shall disclose to the commissioner the amount of the gross premiums paid or agreed to be paid for such insurance. For refusal to obey such request, such insured shall forfeit to the State of California the sum of two hundred dollars for each refusal."

It is apparent from these subdivisions that the purpose of this section is not the protection of the insuring public but a conservation of business for companies admitted in the State of California. Further, other sections of the California law, as well as a long line of decisions, have attempted to preserve to the individual the right to insure his life or his property with any insurer of his choosing. (Section 1760 of the California Insurance Code.)

Allger v. Louisiana, 165 U. S. 580, 41 L. Ed. 832, 17 S. Ct. 427;

St. Louis Compress v. Arkansas, 260 U. S. 34, 67 L. Ed. 297, 43 S. Ct. 145;

Couch Encyclopedia, of Insurance Law, Vol. I, p. 578, No. 245D.

If then, any individual has a right to insure his life with this appellant if he so chooses, how can it be said that after he has contacted the insurer for this purpose that any person who assist him in any of the details thereof has committed an offense or that such acts, legal when done by one person, are illegal when done by another.

III.

This section of appellees' brief is merely re-stating their contention that California statutes as applied to the acts complained of do not constitute a discrimination between foreign and domestic insurers for their agents. Counsels' constant repetition of this statement may have convinced them that it is true, but their discussion of their statutes involved, that no life insurance company except those writing on a legal reserve basis will now be permitted to even complete an interstate transaction with a citizen of California coupled with their admission that there are companies in California still operating in the same manner as appellant thoroughly refutes this bare statement.

A glance at the meaning of the words "legal reserve insurance" as compared to the tabular reserve maintained by such companies as appellant discloses that the difference between them is a matter of bookkeeping. The legal reserve company sets aside a reserve, however small it may be, against each policy, while appellant and similar companies set aside one reserve against its entire contingent liability. This reserve can be, and many times is, larger in proportion than that set up on the legal reserve basis, however upon the statement of the case by appellees, even if appellant's reserves were proportionately one hundred times larger than the reserves maintained by any legal reserve company in the world, appellant still could

not be admitted in that state, and according to appellees, the officers of the state would be entitled to arrest any man who delivered a newspaper to a citizen of California containing an advertisement by such a company. It should be noted also that a company operating under the Arizona law, by authority of which appellant was organized and exists, and the provisions of the California law for similar companies, would not permit appellant to conduct its bookkeeping system on the legal reserve basis.

Under their oft repeated statement that California regulatory statutes do not discriminate between foreign and domestic insurance companies the appellees have cited *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, decided on March 1, 1943. This case was decided approximately a year before the handing down of the decision in *United States v. Southeastern Underwriters Assn., supra,* and while the reasoning of *Paul v. Virginia* was still the law. In spite of that fact, this decision does not uphold the law of New York on the ground that it has the right to regulate interstate commerce, but the Court has gone to great length to inquire into and analyze the entire transactions of this company and sustained the right of New York to regulate it by arriving at the conclusion that the company was actually doing business within the State of New York. All of the transactions of this company were in the State of New York except that its head office was maintained in Illinois and its contracts were signed by proxy in Illinois.

The Court said in part:

> "* * * we conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, consideration of the location of

> the activities prior and subsequent to the making of the contract (Osborn v. Ozlin, *supra,* of the degree of interest of the regulating state in the object insured, and the location of the property insured are separately and collectively of great weight * * *."

The Court continued in substance that since all of the transactions except the actual signing of the contracts by proxies in Illinois were transacted in New York, that the insurance company was actually doing business in the State of New York. This careful weighing of the facts to determine whether or not the company was doing business in New York could only be based upon the realization by the Court that if it were not actually doing business within the state, that its interstate transactions would not be subject to regulation by New York.

On page 28 of their brief, appellees have cited *State Farm Mutual Auto Ins. Co. v. Duel,* 65 S. Ct. 572, 324 U. S. 154, decided February 12, 1945, in which the Supreme Court held that a law of Wisconsin requiring a different reserve than that required by Illinois, the home state of the company involved, did not violate the Due Process Clause of the United States Constitution. Counsel have neglected to add that the matter of interstate commerce was raised in this case, after the decision in the state court, for the first time in the Supreme Court and that the Supreme Court devoted a considerable portion of its opinion to a statement that the State Farm Mutual Auto Insurance Company still had the right to raise the interstate commerce question for the first time in the Wisconsin Court and that for that reason the Supreme Court was not now deciding the interstate commerce question raised by the *Southeastern Underwriters* case, which it recognized as a supervening event, giving the appellant in

that case the right to raise the question again in the Wisconsin Court. Will counsel explain why, if the Supreme Court intended to say that there was to be no change in the application of the regulatory laws in the state, that it regards the *SEUA* case as a supervening event in this matter?

Counsel says there is no reason why the logic applied under the Due Process Clause should not have equal force under the Commerce Clause. The apparent reason is that that Supreme Court has said in the very case cited by counsel that the *SEUA* case has changed the situation.

We again quote a short statement by the Supreme Court in the above case relied upon by counsel:

> "If a state undertook to regulate out of state activities through such a requirement different questions would be posed."

IV.

Appellees' statement under the section number IV that the Commerce Clause of the United States Constitution does not bar a state from adopting regulatory measures in the exercise of its police power is also "exaggerated", and, like the statement that the *Southeastern Underwriters'* decision would do away with all state regulation, this statement is also subject to "qualifications".

We believe that counsel will agree that this broad statement is put in rather unfortunate language, for if counsel means that no law passed by the state under its police power could be considered barred by the Commerce Clause of the United States Constitution, then their statement is contrary to practically every case ever rendered on this subject. If counsel's statement is true, then they would be resurrecting that multitude of laws enacted by the

states in the exercise of their police power that have been declared unconstitutional because they constituted an undue burden on interstate commerce. We believe that counsel did not mean this statement could be true in the broad sense in which it is stated, in view of the fact that they have continued on page 31 of their brief with the statement that the Courts have attempted in individual cases to reconcile the police power of the states and the Commerce Clause of the Constitution wherever possible and have at length set out argument from this type of case. Evidently counsel have searched the reports diligently and thoroughly to find cases to support their contention that the state may even require its permission by way of license before a foreign company could enter into an interstate transaction with one of its citizens, but no such case evidently has been found, for they have neither cited nor quoted one. We too have searched diligently for such a case and after this search believe that there is no such decision in the books.

It may be true as counsel states on page 37 of appellees' brief that there has been a liberalization in the matter of allowing concurrent state regulation in the matter of interstate commerce, but none of the cases cited and none of the authorities on this subject have ever gone beyond the proposition that the state may regulate interstate commerce only when that regulation is purely local in its application. We have found no case nor any authority of any kind to support the proposition that a state government may enact a law stating that a certain type of commerce can continue to be transacted by certain individuals within its borders, prohibiting every other individual therefrom, and then applied that prohibition to individuals sending the same article into the state in an interstate

transaction. As we have above stated, the only instance of such a situation is the one specially provided for under the Twenty-first Amendment to the United States Constitution.

V.

Under section V of their brief, appellees have stated that Congress has now approved of state regulation of insurance companies.

The very fact of this enactment would indicate that the legislators believe that without it, state regulation would be interfered with under the new status of insurance in regard to commerce. If, under the Constitution, the Equality Clause must now be applied to this type of interstate commerce and if now, under the Constitution, it cannot be prohibited by the states and if it is more than local in its application or continues in violation of constitutional guarantees, then an act of Congress is of no avail. The meaning of the Constitution is solely the prerogative of the Courts. It cannot be amended by Congress and a construction placed upon it by Congress is not binding upon the Courts.

There are two possible effects of this act. One is that Congress, who originally enacted the Sherman Anti-Trust Act, may now declare a moratorium in the application of that act. It may also clarify its own attitude as to whether or not it has or does wish to invade a field that may be subject to state regulation so long as the Congress has not invaded that field. Although prohibition of interstate commerce in this regard is a regulation thereof, appellees have not even been able to cite any authority that would require that appellant obtain the consent of the state of California to insure one of its citizens or to employ an

agent to assist in an interstate transaction where the locale of the business is outside of that state.

We would again ask counsel how appellees can state that they wish to prescribe standards which must be adhered to by appellant before making such transactions when they have already admitted that no such regulations exist by the State of California and that any attempt to in any manner transact an insurance business with a resident of California will not be permitted by that state regardless of the standards maintained by the appellant. The only possible application the said Public Law 15 could have in this matter would be that Congress does not wish at this time to regulate the insurance business.

VI.

Under section VI of their brief, appellees again state that they are entitled to a dismissal of this action under the Eleventh Amendment and the gist of the entire matter seems to be that if the acts complained of in the complaint are unconstitutional or illegal or, done under the authority of an unconstitutional law, then the action is one against the officers, but that if the acts complained of are legal, constitutional acts within the authority of a constitutional and legal law, then they are against the state.

Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A. N. S., 932, 14 Ann. Cas. 764.

Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280.

Gunter v. Atlantic Coast Line R. Co., 200 U. S. 73, 283.

We see no point in entering into a long argument to determine whether or not certain acts are legal and constitutional or performed under the authority of a constitutional statute and then entering into precisely the same argument to determine whether or not the action is one against the state. It so happens that this question is disposed of by the determination of appellant's right to relief itself.

In closing it should be borne in mind that two motions were filed by appellees in the Court below. One was for Dismissal and the other for a More Definite Statement. The Motion for a more definite statement was not disposed of for the reason that the motion to dismiss was granted without leave to amend, and a judgment of dismissal with costs rendered in favor of the appellees.

This could be based only upon the proposition that the issues involved herein are outside the jurisdiction of the trial Court. We submit that this is not the law of this case and that the decision of the lower Court should be reversed.

Respectfully submitted,

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Earl Blodgett,

Attorneys for Appellant.